STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DANA R. SCHWARTZENFELD,

Defendant-Appellant.

UNPUBLISHED
March 3, 2000

No. 212316
Oakland Circuit Court
LC No. 97-156725 FH

Before: Jansen, P.J., and Collins and Sullivan*, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of fourth-degree criminal sexual conduct (CSC), MCL 750.520(e); MSA 28.788(5), for which she was sentenced to two years' probation, with one day in the county jail. Defendant appeals as of right and we affirm.

Defendant and her fiancé were teaching assistants at Oakland Community College. They approached a student about doing some remodeling work on their basement. The student initially agreed, but did not follow through. According to the student, they approached him a second time at school but he said he was too busy. Defendant's fiancé said they would make it worth his while to do the job, but he was noncommittal. The student then went to the computer lab to study. About half an hour later, defendant approached the student in the lab and asked to discuss the remodeling job "upstairs." Thinking they were going to meet defendant's fiancé, the student agreed and followed defendant to the third floor of an adjoining building. Once there, defendant unlocked the door to her office and allowed the student to enter. Defendant followed him in and closed the door, but did not turn on the lights. When the student turned around to see what was happening, defendant grabbed and massaged his genitals through his slacks, saying "this is how it could be worthwhile."

On appeal, defendant argues that the trial court erred in denying her motion for a directed verdict brought after the prosecutor's opening statement because the prosecutor failed to set forth all the elements of fourth-degree CSC, erred in denying her motion for a directed verdict at the close of the prosecutor's case in chief, and also erred in instructing the jury on the elements of the crime. All three

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

arguments are based on the same premise, i.e., that the prosecutor must prove that defendant acted with the intent to achieve her own sexual arousal or gratification through the touching.

I. Standards of Review

The merit of a directed verdict motion is assessed through consideration of the evidence presented by the prosecution in a light most favorable to the prosecution to determine whether a rational trier of fact could find that the elements of the crime were proven beyond a reasonable doubt. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993). Circumstantial evidence and reasonable inferences drawn from the evidence may be sufficient to prove the elements of a crime. *Id.*

Statutory interpretation is a question of law that is reviewed de novo on appeal. *People v Seeburger*, 225 Mich App 385, 391; 571 NW2d 724 (1997). The rules of statutory construction require the courts to give effect to the Legislature's intent. This Court should first look to the specific statutory language to determine the intent of the Legislature, which is presumed to intend the meaning that the statute plainly expresses. *Institute in Basic Life Principles, Inc v Watersmeet Twp (After Remand)*, 217 Mich App 7, 12; 551 NW2d 199 (1996). If the language is clear and unambiguous, the plain meaning of the statute reflects the legislative intent and judicial construction is not permitted. *Tryc v Michigan Veterans' Facility*, 451 Mich 129, 135-136; 545 NW2d 642 (1996). If reasonable minds could differ regarding the meaning of a statute, judicial construction is appropriate. *Yaldo v North Pointe Ins Co*, 457 Mich 341, 346; 578 NW2d 274 (1998). If judicial interpretation is necessary, the Legislature's intent must be gathered from the language used, and the language must be given its ordinary meaning. In determining legislative intent, statutory language is given the reasonable construction that best accomplishes the purpose of the statute. *Frankenmuth Mutual Ins Co v Marlette Homes, Inc*, 456 Mich 511, 515; 573 NW2d 611 (1998).

Defendant did not preserve the instructional issue by objecting to it below, thus relief will be granted in the absence of an objection only in cases of manifest injustice. *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993).

II. Sufficiency of the Evidence

A person is guilty of fourth-degree CSC if he or she engages in sexual contact with another person and force or coercion is used to accomplish the sexual contact. MCL 750.520e(1)(b); MSA 28.788(5)(1)(b). Sexual contact is defined to include the sexual touching of the victim's or the defendant's intimate parts, i.e., genital area, groin, inner thigh, buttocks, or breasts, or the intentional touching of the clothing covering the immediate area of the victim's or the defendant's intimate parts, "if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification." MCL 750.520a(c) and (k); MSA 28.788(1)(c) and (k).

Criminal sexual conduct is a general intent crime; the defendant's specific intent is not at issue. *People v Piper*, 223 Mich App 642, 646; 567 NW2d 483 (1997). That means that, while "[t]he actor must touch a genital area intentionally, . . . he need not act with the purpose of sexual gratification. Rather, it suffices if 'that intentional touching *can reasonably be construed as being for the purpose*

of sexual arousal or gratification.'" *People v Fisher*, 77 Mich App 6, 13; 257 NW2d 250 (1977) (emphasis in original); accord *People v Brewer*, 101 Mich App 194, 195-196; 300 NW2d 491 (1980) (the "defendant need not have specifically intended to perpetrate the touching for the purpose of sexual arousal or gratification as long as such a purpose may be construed from this act of touching").[1] Thus, the relevant determination is "whether the defined conduct, when viewed objectively, could reasonably be construed as being for a sexual purpose." *Piper*, *supra* at 647.

Defendant contends that the person who engages in the sexual contact must be the person who derives sexual pleasure from the experience.[2] However, defendant then postulates that, because she must be the one who derives the sexual pleasure from the touching, the prosecutor must prove that she acted with that intent. She therefore contends that, because the proofs showed that she intended to sexually stimulate the student to induce him to do the remodeling work, and thus intended to cause him to derive sexual arousal or gratification from the touching, she herself did not engage in "sexual contact" as defined by § 520a(k).

Defendant's premise that fourth-degree CSC is a specific intent crime is contrary to the law. Moreover, we reject defendant's claim, based on a single statement found in *People v Lemons*, 454 Mich 234, 253; 562 NW2d 447 (1997), that the law has been changed. In *Lemons*, the defendant, who was charged with first-degree CSC, argued that the trial court erred in denying her request for an instruction on the lesser included offense of second-degree CSC. Because a court must give a necessarily included lesser offense but need only give a cognate lesser included offense if supported by the evidence, *id*. at 254, the Supreme Court was required to decide whether second-degree CSC was a necessarily included or cognate lesser offense of first-degree CSC. The Supreme Court reasoned that, because sexual penetration need not be for any particular purpose whereas sexual contact requires that the touching must be such that it can reasonably be construed as being for the purpose of sexual arousal or gratification, second-degree CSC is a cognate lesser offense of first-degree CSC "because CSC II requires proof of an intent not required by CSC I—that *defendant intended to seek sexual arousal or gratification . . . .*" *Id*. at 253 (emphasis added). Based on that one statement, defendant contends that fourth-degree CSC is a specific intent crime and, while *Piper* held otherwise, it failed to take note of the change in the law heralded in *Lemons*. We disagree. The Supreme Court was not called upon to decide the issue raised herein and, therefore, that one statement in *Lemons* cannot be construed as overruling *Fisher* and its progeny.

Therefore, while defendant's statement about making it worth the student's while to do the remodeling work showed that she was trying to sexually arouse him, it does not of necessity preclude a conviction because, whether defendant was in fact sexually aroused or gratified is irrelevant so long as her conduct could reasonably be construed as being for the purpose of her own sexual arousal or gratification. The evidence, when viewed in a light most favorable to the prosecution, showed that defendant lured the student to a secluded area and rubbed his genitals. The nature of the act coupled with defendant's statement showed that the touching was intentional as opposed to accidental. Defendant did not have a legitimate, nonsexual purpose for touching the student and thus her act could reasonably be construed as being for the purpose of sexual arousal or gratification. Therefore, the evidence was sufficient to support the conviction.

Similarly, the evidence proffered in the prosecutor's opening statement was sufficient as a matter of law to convict defendant because the jury could conclude beyond a reasonable doubt that defendant's conduct could reasonably be construed as being for the purpose of sexual arousal or gratification. Thus, the trial court did not err in denying defendant's motion for a directed verdict at the close of the prosecutor's opening statement.

Because fourth-degree CSC is not a specific intent crime, the trial court's instructions on the elements of the crime, which were given in accordance with CJI2d 20.13, were likewise proper.

Affirmed.

/s/ Kathleen Jansen
/s/ Jeffrey G. Collins
/s/ Joseph B. Sullivan

[1] The *Fisher*, *Brewer*, and *Piper* cases all involved second-degree CSC, MCL 750.520c; MSA 28.788(3), which, like fourth-degree CSC, is predicated upon sexual contact as defined in § 520a(k), but occurs under more serious circumstances. The Supreme Court cited both *Fisher* and *Brewer* with approval in holding that first-degree CSC, MCL 750.520b; MSA 28.788(2), is not a specific intent crime. *People v Langworthy*, 416 Mich 630, 645, n 26; 331 NW2d 171 (1982).

[2] We do not quarrel with this contention considering that the statute is intended to punish a person who sexually assaults another person and a person who is sexually assaulted will not "enjoy" the experience.